United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7175

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORK

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

-against-

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, Inc., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES MACKELL, ROBERTSON, LUDWING AND MCKEAN

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
Mackell, Robertson, Ludwig,
McKean
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212)488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Statement	1
Questions Presented	2
Facts	2
Opinions Below	8
POINT I - THE COMPLAINT IS TIME BARRED	9
POINT II - THE DEFENDANT PROSECUTORS WERE IMMUNE FROM SUIT UNDER THE CIVIL RIGHTS ACT UNDER BINDING DECISIONS	11
Conclusion	16

TABLE OF CITATIONS

	PAGE
Brault v. Town of Melton, 527 F. 2d 730 (2d Cir. 1975)..	13
City of Detroit v. Grinnell Corp. 495 F. 2d 448 (2d Cir. 1974).....	10
Corby v. General Motors Corp. 373 F. Supp. 967 (SDNY 1974).....	13
Ervin v. Lanier 404 F. Supp 15 (EDNY 1975).....	9
Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967).....	12
Fowler v. Vincent, 366 F. Supp. 1224 (SDNY 1975).....	13
Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), cert. den. 339 U.S. 949 (1950).....	12
Hileman v. Knable, 391 F. 2d 596 (3d Cir. 1968).....	11
Imbler v. Pachtman, 426 U.S. 409 (1976).....	12
Kaiser v. Cahn, 510 F. 2d 282 (2d Cir. 1974).....9,	16
Martin v. Mercla, 532 F. 2d 191 (2d Cir. 1976).....	15
Mulligan v. Schlachter, 389 F. 2d 231 (6th Cir. 1968)..	11
Rego Trading Corp. v. Burns, 361 F. Supp. 351 (SDNY 1973).....	13
Rochebaud v. Ronen, 351 F. 2d 533 (9th Cir. 1965).....	14
Williams v. Halpern, 360 F. Supp 554 (SDNY 1973).....	13
Yasselli v. Goff, 12 F. 2d 296 (2d Cir. 1926) aff'd 275 U.S. 503 (1927).....	12

Statutes

Federal	PAGE
42 U.S.C. 1983	7, 9, 10, 11, 14
42 U.S.C. 1985	8
42 U.S.C. 1986	8
New York	
CPLR 203(f)	8, 10
CPLR 214	10, 16
CPLR 215	15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

-against-

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, Inc., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES MACKELL, ROBERTSON, LUDWING AND MCKEAN

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York,

dated March 17, 1977, which granted appellants' motion to dismiss the complaint as barred by New York CPLR § 203 (f).

Questions Presented

1. Is the appellants' complaint time barred?

2. Are the prosecutor appellees immune from suit under the federal civil rights statute where appellants complain about actions taken in the course of the prosecutors' official duties?

Facts

The complaint alleges that G. Thomas Cestaro is the principal owner, officer and operator of the Sta-Brite Auto Painting Corporation. Catherine Cestaro was a part-time secretary employed by Sta-Brite Auto Painting Corporation and held the title of corporate secretary. Richard Marchetti, until April 27, 1971, was employed by Avis Rent-A-Car System, Inc. as a damage control supervisor. His responsibility, in part, was to review and approve estimates of auto repair work submitted by Sta-Brite Auto Painting Corporation. Sta-Brite Auto Painting Corporation, a New York corporation,

operated an auto body and repair shop in Jamaica, Queens, New York. From 1962 or 1963 until April 26, 1971, Sta-Brite repaired cars for Avis Rent-A-Car System, Inc., as a contractor mechanic.

Thomas J. Mackell was the District Attorney of Queens County; Frederick J. Ludwig was Chief Assistant District Attorney; James D. Robertson was Deputy Chief Assistant District attorney for Queens County and David J. McKeon was Assistant District Attorney of Queens County. Salvatore Giuffreda, John Savage, Bernard Nelson, Charles Napolitano, and Stuart B. Stillman were either officers or employees of defendant Avis Rent-A-Car System, Inc. International Telephone & Telegraph Corporation is the parent of Avis, owning more than a majority of the outstanding common stock of Avis.

Appellants allege that sometime in 1970 or early 1971, Guiffreda, Stillman, Savage, Nelson and other Avis employees concluded tht criminal proceedings should be instituted against some or all of the appellants for padding bills submitted by Sta-Brite to Avis, for not having made all the repairs claimed to have been performed. Thereafter,

Savage and Nelson met with Robertson and requested that the Queens County District Attorney's office undertake a criminal investigation of appellants and ultimately bring criminal charges against them. Robertson introduced Savage and Nelson to Mackell and Mackell and Robertson agreed to Avis' request.

Mackell and Robertson Assigned Mckeon to the case. After some preliminary investigation, McKeon or another employee of the Queens County District Attorney's office acting under his direction, prepared a grand jury subpoena which was served on Sta-Brite and Cestaro on April 26, 1971. The subpoena was served by representatives of Avis, the Queens County District Attorney's office and the New York Police Department. The subpoena required Sta-Brite to "Deliver forthwith to Bearer" all of its financial and business records. McKeon was not present. Acting purportedly pursuant to the subpoena, ten Avis employees in concert with representatives of the Queens County District Attorney's office physically confiscated thirty-two Avis cars which Sta-Brite was repairing under an Agreement with Avis. Appellants allege, upon information and belief, pursuant to an agreement between McKeon and Nelson,

that the cars were delivered to Avis' facility at JFK International Airport. There the cars were inspected for evidence of criminal behavior but no evidence was found. The cars were dispersed throughout the Avis System. Plaintiff alleges a mechanic lien on these cars for work amounting to $15,000.

Pursuant to the subpoena, Sta-Brite's business records were also seized. These records were ultimately returned to Sta-Brite.*

Appellants allege that the purpose of appellants' actions was solely to harass appellants, to violate their contractual rights and to interfere with their mechanics liens and if possible, to supply previously non-existent evidence of criminal activity.

The complaint goes on to allege that no evidence of criminal activity was found but that the grand jury in May 1971, at the direction of McKeon, indicted all four appellants on counts of grand larceny, conspiracy and other charges arising out of appellants' submission to Avis of

* Appellants further allege that after the raid on Sta-Brite's shop, Giuffreda suspended Marchetti without pay. Avis subsequently terminated Marchetti's employment on June 7, 1971.

allegedly fraudulent bills for repair work totalling $2,469.47.

Cestaro, Mrs. Cestaro and Marchetti were arrested on June 8, 1971. They allege that the arrests were without probable cause and that a press release issued by the Mackell appellees the day appellants were arrested went beyond the charges of the indictment.

Appellants' trial began on June 8, 1972. McKeon was the prosecuting attorney. As a result of a plea bargain, Sta-Brite pleaded guilty to one count of grand larceny, third degree, a Class E felony under New York Law and paid a fine of $2500. The remaining charges against Sta-Brite and all the charges against Cestaro, Mrs. Cestaro and Marchetti were dismissed upon the execution by Mr. & Mrs. Cestaro of a limited release in favor of Avis and by Marchetti of a general release in favor of Avis and the Queens County District Attorney's office. Sta-Brite pleaded guilty on June 9, 1972.*

The complaint alleges that it was not until May 3, and October 11, 1973 and February and March, 1974 that appellants learned that the Mackell and Avis appellees were engaged in an illegal conspiracy to violate their rights when the New York

* Appellants allege that Ludwig insisted that Sta-Brite plead guilty to a felony.

State Joint Legislature Committee on crime held public hearings and Monty, Chief Investigator in the Queens County District Attorney's office, was tried.

The complaint alleges, upon information and belief, that it was also part of the agreement between the Mackell and Avis appellees to conceal their conspiracy from members of the general public and from appellants. In September, 1973, a former Avis employee offered Cestaro a large sum of money if the appellants would have the State Legislative Committee call off its investigation. Stillman personally repeated the same offer to Cestaro in October, 1973.

Count one of the complaint alleges that all appellees violated plaintiffs' rights and privileges under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellants' second count alleges that acting under color of State law, the Mackell and Avis appellees, in violation of 42 U.S.C. 1983, deprived appellants of rights, privileges and immunities secured to them by the Constitution

and laws of the United States.* Count four seeks a declaration against the Mackell appellees that the indictment and arrest of all appellants except Sta-Brite were void and obtained in violation of their constitutional rights.*

Opinion Below

Accepting appellants' claim that they did not learn of the alleged conspiracy between the Markell and Avis defendants until public hearings held by the New York State Joint Legislature Committee on Crime in May, 1973, and not deciding whether the federal concealment doctrine applied so as to stay the running of the statute of limitations, the District Court, nevertheless, held appellants' complaint, filed on April 12, 1976, out of time. The Court found dispositive appellees' argument that when the concealment doctrine is invoked to toll a limitations period which otherwise would have expired, then a separate two year statute becomes applicable, NYCPLR § 203(f), to run from the date of "discovery." Since appellants did not institute their action by May, 1975, their complaint was out of time.

* The third count alleged that the Mackell and Avis defendants conspired in violation of 42 U.S.C. §§ 1985 and 1986 to deprive plaintiffs of equal protection of the law. By stipulation filed November 9, 1976, plaintiffs withdrew this count without prejudice. The fourth count initially sought a declaration against all the defendants that the conviction of Sta-Brite and the arrest and indictment of the other plaintiffs was void.

POINT I

THE COMPLAINT IS TIME BARRED.

Insofar as plaintiffs allege a claim under 42 U.S.C. 1983, this Court has repeatedly held that the applicable statute of limitations is three years. Accordingly, even computing the statute of limitations from the date of the plea, June 9, 1972, since this action was commenced in April, 1976, Count two of the complaint is barred by a three year statute of limitations. Kaiser v. Cahn, 510 F. 2d 282, 284-285 (2d Cir. 1974). This Statute of Limitations is also, at best, applicable to Count one of the complaint. Ervin v. Lanier, 404 F. Supp. 15, 20 (E.D.N.Y. 1975).

Ignorance of a cause of action does not extend the applicable time period. Moreover, even if it could, at bar, plaintiffs were on notice from at least April 26, 1971, when a subpoena was served on Sta-Brite and Cestaro in the alleged presence of Avis employees that the means for obtaining an indictment had been set in motion and whether they were, in fact, innocent of any wrongdoing. They knew of all the wrongs they alleged in the complaint, i.e., an improper subpoena, an improper arrest, improper publicity, and an improperly insisted upon guilty plea. The appellees did not conceal the basic facts

that would reveal the existence of their allegedly illegal behavior and appellants simply chose not to act on the facts known to them in a timely fashion. Accordingly, they may not avail themselves of the federal concealment doctrine. City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2d Cir. 1974).*

Of course, no later than May, 1973, appellants admit, in their complaint, that they had learned of the alleged conspiracy. N.Y.C.P.L.R. 203(f) provides that where the time within which an action must be commenced is computed from the time when facts were discovered which give rise to the cause of action, the statute of limitations is two years computed from the date of discovery of such facts. So even allowing plaintiffs the benefit of the concealment doctrine, their complaint was still clearly out of time.

Finally, appellees would point out that there is no question that the District Court Judge in light of Kaiser v. Cahn, supra, correctly held that NYCPL 214(2) is applicable to a § 1983 suit. But it may also be argued that the applicable statute is one year. Appellant's complaint at bar sounds in malicious prosecution and under New York law a one year statute of limitations is applicable. NYCPLR 215. Applying this statute and even measuring the period from the date plaintiffs alleged they learned of the conspiracy, there

* Moreover appellants fail to cite authority for the proposition that the federal concealment doctrine is even applicable at bar. In Moviecolor Ltd. v. Eastman Kodak Co., 288 F. 2d 80 (2d Cir.) cert. den. 368 U.S. 821 (1961), the Circuit Court was careful to point out that there was no reason not to apply the doctrine to a federally created right that could only be enforced in a federal forum. That is not the case here. State and federal courts have concurrent jurisdiction in civil rights action.

is no question but that their complaint was out of time. Hileman v. Knable, 391 F. 2d 596 (3d Cir. 1968); Mulligan v. Schlachter, 389 F. 2d 231 (6th Cir. 1968). See Johnson v. Railway Express Agency, 421 U.S. 454 (1974).

POINT II

THE DEFENDANT PROSECUTORS WERE IMMUNE FROM SUIT UNDER THE CIVIL RIGHTS ACT UNDER BINDING DECISIONS

Appellant's complaint against the prosecutor appellees sounds in malicious prosecution. It is appellants' argument, essentially, that they were really innocent, that there was no evidence against them and that they were prosecuted solely because the prosecutor appellees were indebted to the Avis appellees for the free use of Avis Rental cars and other favors.* However, it is well established that a prosecutor enjoys absolute immunity from a civil suit for damages under 42 U.S.C. § 1983 when he acts within the scope of his prosecutorial duties.

> "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court.

---

* This claim is, moreover, disingenuous to say the least. Appellants fail to explain why the Avis appellees would ask the prosecutor appellees to initiate criminal charges unless in fact appellants were padding their bills. This guilt was further confirmed by Sta-Brite's plea of guilty.

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages" Imbler v. Pachtman 424 U.S. 409, 424 (1976).

The Court in Imbler held that immunity attaches to the prosecutors' role when he acts as an advocate, stating,

> "[I]n initiating a prosecution and in presenting the States case, the prosecutor is immune from a civil suit for damages under 1983". Imbler at 431.

Moreover the Court recognized "the the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom". Imbler at 431, n. 33.

Prosecutorial immunity is extended notwithstanding an allegation that pure spite motivated the prosecutor. Yasselli v. Goff, 12 F 2d 296 (2d Cir. 1926), aff'd 275 U.S. 503 (1927) (per curiam), or an allegation that the prosecutors conspired together and maliciously and willfully entered into a scheme to deprive plaintiff of liberty." Gregoire v. Biddle 177 F 2d 579 (2d Cir. 1949), cert den., 339 U.S. 949 (1950). See also Fanale v. Sheehy, 385 F 2d 866 (2d Cir. 1967). This was firmly established even prior to Imbler.

The principle of Yasselli, Gregoire and Fanale has been continuously applied by the District Courts in this Circuit in cases where the complaints contained allegations of gross

indignities and egregious violations of the plaintiff's constitutional rights. Corby v. General Motors Corp., 373 F. Supp. 967 (S.D.N.Y. 1974) (Complaint alleged that prosecutors conspired with private persons to obstruct justice by giving away plaintiff's repossessed auto after releasing it from official custody and basing prosecution on perjured testimony); Fowler v. Vincent, 366 F. Supp. 1224 (S.D.N.Y. 1973) (Allegation that prosecutor's investigation of assault incident in correctional facility violated plaintiff's right to due process); Rego Trading Corp. v. Birns, 361 F. Supp. 1351 (S.D.N.Y. 1973) (Complaint alleged illegal search and seizure pursuant to a search warrant issued without probable cause and based on a false affidavit); Williams v. Halpern, 360 F. Supp. 554 (S.D.N.Y. 1973) (Allegation that prosecutors conspired to deny plaintiff's constitutional rights in the prosecution).

It is clear from the complaint that the acts of the prosecutor appellees were performed in fulfillment of their duty as public prosecutors as defined in this Circuit. Therefore, they are immune from suit under the civil rights acts. Moreover, the same public policy considerations would dictate immunity under Count I of the complaint, even assuming it were a possible theory of liability which appellees dispute. Brault v. Town of Melton, 527 F. 2d 730, 738 (2d Cir. 1975).

In an effort to circumvent the clear authority in this Circuit that appellees at bar are immune from suit under § 1983, appellants rely on cases in other Circuits for the proposition that this immunity does not extend to actions of prosecutors when they engage in investigative activities undertaken by policemen and appellants argue that the service of the grand jury subpoena was such an activity.* However, even assuming this were the law in this Circuit, which it is not, appellants' argument still misses its mark since none of the prosecutor appellees engaged in investigative police activities.

Here there was a decision to initiate a prosecution -- the very heart of the prosecutor's role as an advocate -- and pursuant to this decision, a grand jury was convened and a subpoena was served.** It is solely the province of a prosecutor

---

* Appellants limit their claim of prosecutorial liability to the grand jury subpoena. Appellants thus concede in this Court that immunity extends to the other prosecutorial activities set forth in the complaint.

** Insofar as appellee Ludwig is concerned, the sole allegation in the complaint against him is that he insisted that Sta-Brite plead guilty to a felony (Complaint, par. 33, Appendix 11a). Decisions as to the kind of pleas to accept are central to the prosecutorial role and appellee Ludwig clearly has immunity from suit under § 1983. Insofar as appellants suggest that Rochibaud v. Ronen, 351 F. 2d 533 (9th Cir. 1965) hold such functions to be non-immune, even if it were the law in this Circuit, there is difference between insisting on a plea and forcing an individual to plead guilty.

to prepare a grand jury subpoena. It is part and parcel of the initiation of a criminal prosecution.* The subpoenaing of evidence for a grand jury is not a police role. It is peculiar to that of a prosecutor. Accordingly, even under the cases cited by appellants, the prosecutor appellees would be immune from suit. Appellants here are attempting to look behind that subpoena and ascribe "improper and malicious actions to the State's advocate." Imbler at 425. However, the Supreme Court in Imbler made clear that immunity must attach to prosecutorial decisions to avoid such accusations which would interfere with the prosecutor fearlessly doing his duty.

Moreover, insofar as appellants argue that prosecutorial immunity does not attach to the issuance of the grand jury subpoena for the Avis rental cars in Sta Brite's possession and the corporation's business records, they have merely highlighted that the statute of limitations ran on their

---

* The complaint additionally alleges that a press release was issued the day of appellant's arrest, June 9, 1971, which went beyond the indictment. However, appellants, in this Court, do not urge this press release as a claim for relief. Of course, they did not go to trial and cannot claim that they were denied a fair trial by this press release. Martin v. Merola, 532 F.2d 1417 (2d Cir. 1976). In any event, as a matter of law, one isolated press release could hardly give rise to a claim that a fair trial was denied. Finally, appellants were aware of the contents of the release as soon as it was issued and any civil rights claim based on the release would be out of time. Appellants' complaint was not filed until April 12, 1976. NYCPLR § 214(2).

claim against the prosecutor appellees. The complaint alleges that pursuant to the subpoena, the Avis cars were confiscated on April 26, 1971 and delivered to Avis' facility at JFK International Airport. They allege that the cars were inspected for evidence of criminal behavior which was never found as none of the cars confiscated on April 26, 1971 were the basis of any of the counts of the indictment.* After inspection, the cars were then dispersed throughout the Avis system. They claim that the value of their services on these cars was at least $15,000.

All these facts were known to appellants by the time of the grand jury indictment in May 1971 (Complaint, par. 25 Appendix 9a) and their delay in bringing their complaint until April 12, 1976 renders it time barred.** Kaiser v. Cahn, 510 F. 2d 282 (2d Cir. 1971); NYCRPLR 214(2).

---

* Plainiffs' complaint thus belies it own basis since they admit that the cars were inspected for evidence of criminal activity notwithstanding their allegation that the appellees knew there was no illegality.

** In order to circumvent the bar of the statute of limitations to their suit against the prosecutor appellees and make the Avis appellees liable in a civil rights suit, appellants' alleged a conspiracy between the prosecutors and the Avis defendants to prosecute them without probable cause. They alleged that this conspiracy was not uncovered until a State legislative hearing in May, 1973. However such an allegation cannot extend appellants' time to sue the prosecutor appellees. By May, 1971, the alleged cause of action against the prosecutors, the only claim made against them, with regard to the grand jury subpoena was complete and known. Moreover, as discussed supra, p. 9, and in the brief of the Avis appellees, since sufficient facts about the alleged conspiracy were known to appellants no later than the date of the plea, appellants may not invoke the federal concealment doctrine to extend their time to file a complaint. Additionally, even if the concealment doctrine were held to apply, appellants were still out of time. NYCPLR 203(f).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED

Dated: New York, New York
June 30, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
Mackell, Robertson, Ludwig
and McKeon

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Arlene Silverman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for appellees herein. On the 30th day of June, 1977 she served the annexed upon the following named person :

Marshall Beil
Kaypatkin Pollet and
Le Monet
1345 Ave of the Americas
NY NY 10019

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, to be deposited in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Arlene R Silverman

Sworn to before me this
30th day of June, 1977

Paul E Dobbin
Dep Assistant Attorney General
of the State of New York